FOR ARGUMENT

(15)

No. 89-700

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP,
Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

The Southeastern Legal Foundation, Inc. ("Southeastern") submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief and their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Dedicated to economic and social progress

through the equitable administration of law, Southeastern presents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Towards that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *South Florida Chapter of the AGC of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir. 1984), *cert. denied* 469 U.S. 871 (1984); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); and *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S.Ct. 706 (1989).

Southeastern has filed numerous *amicus curiae* briefs in the federal courts at all levels expressing its opposition to racial preferences which do not comply with the strict scrutiny standard of constitutional review. Southeastern submitted its views in *United Steel Workers of America v. Weber*, 563 F.2d 216 (5th Cir. 1977), rev. 443 U.S. 193 (1979); *Cramer v. Virginia Commonwealth University*, 586 F.2d 297 (4th Cir. 1978); and *S.J. Groves & Sons Co. v. Fulton County*, 696 F.Supp. 1480 (N.D. Ga. 1987) (Appeal pending). Southeastern represented a non-minority subcontractor who challenged the administration of the minority and disadvantaged business enterprise provision of the Surface

Transportation Assistance Act of 1982 by the North Carolina and United States Departments of Transportation. *Carpenter v. Dole, et al.*, File No. 85-527-CIV-5 (U.S.D.C. E.D.N.C.), vacated and remanded, *Carpenter v. Barnhart*, et al., No. 88-3578 (4th Cir. 1990) (unpublished opinion, January 16, 1990).

STATEMENT OF THE CASE

Amicus adopts the statement of the case contained in the brief on behalf of Respondent, Shurberg Broadcasting of Hartford, Inc.

SUMMARY OF ARGUMENT

The standard of strict scrutiny should be applied to the racial preference policies of the FCC. This Court should not adopt a standard of review for race-conscious policies of the Federal Government, including Congress, which would allow strict scrutiny to be satisfied by legislative enactments lacking a firm factual basis.

The FCC's distress sale policy is not a program which was promulgated by Congress. In ratifying the FCC's programs and in prohibiting the Commission from conducting a reexamination and reevaluation of its racial preference policies, through amendments to appropriation bills, Congress has engaged in the type of casual legislative use of racial preferences which is prohibited by this Court's decisions.

The FCC's race-conscious policies make no effort to prevent persons who are not disadvantaged from benefiting from the program based solely on their race. For this reason, the program is not narrowly tailored, and it also lacks the fundamental moral and ethical justifications relied upon in *Fullilove* and elsewhere to justify the limited use of racial preferences for remedial purposes.

ARGUMENT

I.
The Supreme Court Has Now Unequivocally Held That Strict Scrutiny Is The Proper Standard Of Review For Government Use Of Racial Preferences, And That Standard Should Be Applied To The FCC's Race-Based Programs.

In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758 (1980), this Court upheld the constitutionality of a Congressional enactment providing for a ten percent set aside of funds expended under a federal statute for firms categorized as minority business enterprises. Although the Court decided numerous other significant affirmative action cases in the meantime, some of which involved issues similar to that presented by the use of racial preferences in public contracts, it was not until 1989 that the Court again directly confronted the

question of the use of racial or ethnic preferences in the awarding of public contracts, in *City of Richmond v. J.A. Croson Company*, 488 U.S. ___, 109 S.Ct. 706 (1989). (Hereinafter "*Richmond*" or "*Croson*.")

Although there were six opinions written in *Croson*, there was, for the first time, an agreement by a majority of the Justices on one key point: *any* legislation based on racial classifications -- regardless of the motivation, and of whether it benefits minorities or non-minorities -- must be examined under a "strict scrutiny" standard. *Richmond v. Croson*, 109 S.Ct. at 722-23, 735; Justice O'Connor's opinion (joined by the Chief Justice, Justice White and Justice Kennedy) 109 S.Ct. at 722-23; Justice Scalia's opinion, 109 S. Ct. at 735.

The *Croson* opinion dealt with the constitutionality of a local minority business enterprise ordinance, without any overtones of federal participation or Congressional authorization. This distinction, however, does not alter the fact that a majority of this Court unequivocally adopted the strict scrutiny standard for any use of race-based remedial measures. In *Croson's* extensive discussion of this Court's *Fullilove* decision, there are references to the standard of review, found in Chief Justice Burger's opinion in *Fullilove*. 109 S.Ct. at 717-18.

Amicus submits that the different level of scrutiny applied in *Fullilove's* principal opinion stemmed not from any difference in the

level of review to be given Congressional enactments, as opposed to those of state or local governments, but from the Court's lack of consensus (until *Croson* in 1989) as to whether a different standard should apply to "reverse," or "benign," or "well-intentioned" discrimination, as opposed to "invidious," or "evil" discrimination. That argument has been resolved. In *Croson,* it was held by a majority of the Justices that *any* race-conscious law will be subjected to strict judicial scrutiny.

While Section 5 of the Fourteenth Amendment may be considered an expansion of Congressional power, and Section 1 of that amendment may be considered a limitation on the power of the states and local governments only, the Congressional power to deny equal protection is *also* limited -- by the Fifth Amendment. That limitation on Congressional use of suspect classifications is identical to that imposed upon the States by the Fourteenth Amendment. See, *e.g., Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("This Court's approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment."); see also, *Washington v. Davis,* 426 U.S. 229, 239 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638, n.2 (1975). Thus, Congress is constitutionally prohibited from utilizing racial classifications in circumstances in which the States would be prohibited from doing so.

It is important to note that *Richmond v. Croson,* while acknowledging that Congress "may identify and redress the effects of society-wide discrimination," 109 S.Ct. at 719, also stressed that any use of racial preferences by government must satisfy the test of strict scrutiny. 109 S.Ct. at 720-21. The Court's opinion in *Croson* also made a pointed reference to the wartime action of the federal government considered in *Korematsu v. U.S.,* 323 U.S. 214, 235-40, 65 S.Ct. 193, 202-05 (1944) (Murphy, J., dissenting), stating that "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Richmond v. Croson,* 109 S.Ct. at 725.

The essence of the Court's holding in *Richmond* is that, whatever may be the professed motivation for governmental use of race, it must always be based upon a compelling governmental interest, for the basic reason that the use of race is always inherently suspect and that, in the absence of necessary safeguards, it has great potential for harm to the principles of our democratic society. "Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Richmond v. Croson,* 109 S.Ct. at 721.

Amicus submits that there is every rea-

son to apply the strict scrutiny standard to the FCC's racial preference policies. Particularly where the policies result not from express Congressional direction, but from agency actions later ratified and then "frozen" by Congress, application of the strict scrutiny test is mandated by this Court's decisions.

II.

The Actions Of Congress, Consisting Primarily Of Endorsements Of FCC Programs And Prohibitions Against Re-Examination Of Those Policies, Do Not Satisfy The Demands Of Strict Scrutiny.

Amicus urges this Court to apply the strict scrutiny standard of review to the racial preference policy at issue here, and also to apply that standard to the Congressional actions in this case. When those actions are tested against the requirements of strict scrutiny, it is evident that the Congress has not, through anything it has done, established the requisite compelling interest for utilization of racial criteria.

It should initially be reiterated that the program challenged in this case is not one which was enacted by Congress, nor is it one which was promulgated pursuant to Congress' powers under Section 5 of the Fourteenth Amendment. As noted in the brief on behalf of the FCC, the Commission's minority preference policies arose as the result of judicial review and intrusion into

the FCC's licensing proceedings. Brief for FCC, pp.2-5. The distress sale policy was initiated by the Commission in 1978. Subsequently, the Commission undertook an inquiry into the validity of its minority and female ownership policies, and that attempt at reexamination and reevaluation led to Congress' actions taken through amendments to appropriations bills. *Id.*, pp.11, 15-16.

Congress' primary involvement has thus been to prohibit the Commission from determining whether its racial preference policies were well founded, either legally or factually. See *Winter Park Communications v. FCC,* 873 F.2d 347 (D.C. Cir. 1989), *cert. granted sub nom Metro Broadcasting, Inc. v. FCC,* 110 S.Ct. 715 (1990).

Whatever may have been the degree of Congressional inquiry into the success of the FCC's policies, in promoting diversity in programming, it is apparent that the record before Congress is woefully lacking in finding any present effects of past discrimination in the broadcast industry itself. As stated by Judge Silberman's opinion below, the "general findings of minority underrepresentation in the broadcasting field differ . . . from the congressional findings the Court encountered in *Fullilove.*" *Shurberg,* 876 F.2d at 915. As noted in that section of Judge Silberman's opinion, this Court's decisions have made clear that underrepresentation, by itself, "cannot be sufficient proof of the effects of past societal discrimination." *Id.* at 915.

In and of themselves, racial preferences can never constitute a compelling state interest. Accordingly, in the absence of a finding or findings of constitutional or statutory violations, any interest which government might have in utilizing race-conscious remedies is not compelling. *Fullilove, supra,* 448 U.S. at 498 (Powell, J. concurring). As stated there, this Court has often struck down racial classifications as an impermissible means of advancing even legitimate governmental interest.

The requirement for findings serves several important purposes: to aid in determining whether or not a remedial racial preference is aimed at past discrimination; to assist in application of the narrowly tailored test (the second prong of strict scrutiny); and to protect against "the casual use of racial distinctions" and to reinforce the seriousness of their utilization. *J.A. Croson Company v. City of Richmond,* 779 F.2d 181, 202 (4th Cir. 1985) (dissenting opinion), *vacated,* 478 U.S. 1016 (1986). *Amicus* submits that these factors are also applicable to actions by Congress, as well as state and local governments, notwithstanding the greater latitude which Congress has in its fact finding capabilities. See *Croson, supra,* 109 S.Ct. at 718-20. Where congressional action is devoid of meaningful findings, it should be found insufficient under the first prong of the strict scrutiny test.

The dangers posed by casual enactment of race conscious remedies by state and local governments are equally present at the national level, particularly where Congress can act through amendments to appropriations bills with little accompanying legislative deliberation. This process is also in marked contrast to the perception of the principal opinion in *Fullilove* that the measure approved there was one which would receive careful reexamination before reenactment, and one which would call for continuing congressional oversight to ensure its constitutionality. "For its part, Congress must proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment. . ." 448 U.S. at 490.

Finally, as noted by Justice Stevens in his dissenting opinion in *Fullilove,* 448 U.S. 532, 542, 548-53, and as argued by former Assistant Attorney General Drew Days, there are numerous reasons not to defer to Congress in this context. "Even proponents (of racial preferences programs) should demand that these efforts by the federal government to assist minority contractors be the result of an open, thorough, and considered process." Days, *Fullilove,* 96 *Yale Law Journal* 453, 469 (1987).

"When Congress has taken the extraordinary step of adopting an explicit

racial classification . . . the Court has the responsibility to assure itself that the decision was reasoned and deliberate." *Id.* at 469-70. *Sub judice,* this Court should require that Congress "demonstrate that it has relied on a complete record and has acted with a full understanding of the program's implications." *Id.* at 470. Congress has not done this, and the lower court's conclusions on this point should be upheld.

III.

It Is Undisputed That The FCC's Minority Preference Policies Do Not Prevent Participation By Minority Group Members Who Are Not Suffering From The Present Effects Of Past Racial Discrimination. The Lack Of Any Safeguards Against Unjust Enrichment Renders The Program Defective Under The Narrowly Tailored Test, And Also Undercuts The Moral And Ethical Basis For Utilization Of Racial Preferences.

The FCC's distress sale policy cannot pass constitutional muster because of its "over-inclusiveness," or lack of safeguard against participation by individuals who are not disadvantaged or otherwise victims of racial discrimination. This factor, among others, convinced the lower court that the program was not narrowly tailored. 876 F.2d at 915-17.

Petitioner urges that such considerations are irrelevant in that the program is not being defended as remedial in nature. Petitioner's brief, p.43. This brief will not deal with the question of whether diversity can constitute a sufficiently compelling State interest to justify the use of racial criteria. Based upon this Court's decisions, *amicus* contends that any use of racial preferences other than to remedy past discrimination cannot be justified.

The discussion that follows therefore assumes the relevance of considerations of the economic status of the beneficiaries, as did the lower court, 876 F.2d at 915-17, and as did this Court in *Fullilove, supra,* 448 U.S. at 471-72 (adequate safeguards against unjust participation) and 448 U.S. at 486-88 (degree of preference relates to effects of past disadvantage or discrimination). See also *Croson,* 109 S.Ct. at 727-730.

A.

The Failure of This Racial Preference Program to Benefit the Disadvantaged.

A recurring criticism of many types of racial preferences, particularly in the context of those preferences which provide a competitive advantage to existing minority businesses, is that the benefits of such programs flow mainly to those who need them the least. This concern is expressed by

scholars on both sides of the argument for and against continued use of racial preferences as a form of affirmative action. Compare the views of William Julius Wilson ("Ghetto underclass individuals are severely under-represented among those who have actually benefitted from such programs,")[1] with those of Thomas Sowell ("In some cases - including the United States - the less fortunate members of a preferred group may actually retrogress while the more fortunate advance under preferential policies.").[2]

Whatever the outcome of the intense and sometimes acrimonious debate over racial preference policies, there can be no doubt that the likely beneficiaries of the FCC's distress sale policy will come from the ranks of those less likely to be suffering from the lingering effects of past racial discrimination. With respect to judicial review of the constitutionality of racial preference programs, the questions of unjust enrichment and protections against it are of key importance. See, *Fullilove, supra,* 448 U.S. at 471-72.

While these concerns usually arise in terms of whether a program survives the narrowly tailored test, it is evident that this issue also goes to the question of whether there is a

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1 William Julius Wilson, *The Truly Disadvantaged* (Chicago: University of Chicago Press 1987), p. 110.

2 Thomas Sowell, "Affirmative Action: A Worldwide Disaster," *Commentary*, December 1989, p. 33.

compelling governmental interest in the use of racial criteria. The moral and ethical underpinnings of such programs are also implicated.

First, in the absence of findings, it is not possible to determine whether a program is in fact narrowly tailored, or whether it may in fact be vulnerable to a charge of political favoritism. *Croson, supra,* 109 S.Ct. at 728. Second, as in *Fullilove,* and as seen in other federal programs, Congress has frequently expressed its intent that such programs should benefit only those who are *actual* victims of racial discrimination. See *Fullilove, supra,* 100 S.Ct. at 2767-68, discussing the Small Business Administration's programs.

Finally, with respect to maintaining public confidence in the integrity of any governmental activity, particularly one utilizing suspect classifications such as race, the perception that such programs are likely to provide benefits for those not actually disadvantaged is likely to lead to negative consequences for all affirmative action programs.

B.

The Appropriateness Of Individualized Inquiries Into The Existence Of Disadvantage.

The defects in the FCC's program are more aggravated when one considers the possibility of individualized determinations of disadvantage in competition for unique opportunities such as a broadcast license. In *Croson,* this

Court strongly indicated that individualized consideration of whether or not a potential participant in a preference program is a victim of racial discrimination should be a part of the process. 109 S.Ct. at 728-29. Administrative convenience is not a sufficient justification to avoid the necessity of this determination. *Id.* at 729.

It is undisputed that the policies at issue in this case do not provide for determination of whether an individual beneficiary or beneficiaries are victims of race discrimination, or are disadvantaged in any way. Considering the uniqueness of the opportunity presented and the relatively small number of individuals involved in the procedures at issue in this case, it would seem that the case-by-case nature of the decision-making process would provide ample room for such individual determinations.

As stated by the dissenting opinion in *Winter Park Communications v. FCC,* 873 F.2d 347, 368 (D.C. Cir. 1989), there is "no obvious need to employ a mechanical racial preference and forego inquiry into the beneficiaries' actual circumstances. No FCC preference for successful Hispanic entrepreneurs can remedy the years spent by other Hispanics picking lettuce as a result of racial discrimination." 873 F.2d at 368.

CONCLUSION

Amicus respectfully requests that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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